

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO

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UNITED STATES OF AMERICA,	:	CASE NO. 5:97-CR-00090
Plaintiff,	:	
vs.	:	ORDER & OPINION
ALEXANDER YAROMICH,	:	[Resolving Doc. No. <a href="#">124</a> ]
Defendant.	:	

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JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

Petitioner Alexander Yaromich moves this Court to disallow the collection of fines or restitution by the Bureau of Prisons or a parole or probation officer. [Doc. [124](#).] The United States of America opposes the motion. [Doc. [126](#).] For the reasons that follow, the Court **DENIES** the Petitioner's motion.

### I. Background

On July 8, 1997, a federal jury found Petitioner Yaromich guilty of three counts of armed bank robbery, in violation of [18 U.S.C. §§ 2113](#) (a) and (d), and three counts of using and carrying a firearm during and in relation to a crime of violence, in violation of [18 U.S.C. § 924\(c\)\(1\)](#). [Doc. 62, 63.] On September 22, 1997, the Court sentenced Yaromich to a total of 610 months incarceration and ordered him to pay a total of \$17,677.74 in restitution. [Doc. 91, 92.] Yaromich appealed his conviction to the Sixth Circuit, which affirmed the District Court's judgment. [United](#)

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States v. Yaromich, 166 F.3d 1216, 1998 WL 833692 (6th Cir. Nov. 20, 1998). On April 3, 2000, Yaromich filed a petition of habeas corpus pursuant to 28 U.S.C. § 2255 [Doc. 106], which the Court dismissed as untimely filed [Doc. 117]. On July 16, 2001, Yaromich filed a motion to modify his sentence pursuant to 18 U.S.C. § 3582(c)(2) [Doc. 121], which the Court denied [Doc. 123].

Yaromich now moves this Court pursuant to 18 U.S.C. § 3572(d) to “Disallow Collection of Fines or Restitution by [an] Unauthorized Entity,” arguing that the Court improperly delegated its authority to impose restitution to the Federal Bureau of Prisons and/or a parole/probation officer. [Doc. 124.] Yaromich asks this court to issue an order directing the Bureau of Prisons to cease collecting restitution from the petitioner and prohibiting a probation or parole officer from collecting such payments from Yaromich. [Id. at 3.]

## II. Analysis

In support of his motion, Yaromich relies on the Fourth Circuit’s decision in *United States v. Miller*, in which that court held that a district court cannot delegate its authority to establish an installment plan for payment of restitution or fines to the Federal Bureau of Prisons or a United States probation officer because it is part of the imposition of a sentence, which is a core judicial function. 77 F.3d 71, 77-78 (4th Cir. 1996).

The Sixth Circuit did not follow Fourth and other Circuits in finding that a court abdicates an essential judicial function by delegating the scheduling of restitution payments. In *United States v. Weinberger*, the Sixth Circuit held that a district court could properly delegate, under the Victim and Witness Protection Act (“VWPA”), 18 U.S.C. § 3663, the setting of a schedule of restitution payments to either the Federal Bureau of Prisons, through the Inmate Financial Responsibility Program (“IFRP”), or to a United States probation officer. 268 F.3d 346, 359-61 (6th Cir. 2001).

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In *United States v. Davis*, however, the Sixth Circuit held that in cases in which the court applies the Mandatory Victims Restitution Act of 1996 (“MVRA”), [18 U.S.C. §§ 3663A-3664](#),<sup>1/</sup> that statute specifically required the district court itself to set a restitution payment schedule in its restitution order, and that a court that delegated the setting of a payment schedule to the Bureau of Prisons or a probation officer would not be in compliance with the express terms of the statute. [306 F.3d 398, 425-26 \(6th Cir. 2002\)](#).

However, the Sixth Circuit in *Davis* did not create a new cause of action under Section 3572(d), the statute upon which the Defendant relies. In *Davis*, the Sixth Circuit entertained Davis’s challenge to his sentence on direct appeal and vacated and remanded his sentence as to the restitution order for the district court to set a payment schedule. [306 F.3d at 426](#). Similarly, the Fourth Circuit, while relying on [18 U.S.C. § 3572\(d\)](#) in its holding, did not create a new cause of action arising out of this Section. See [Miller, 77 F.3d at 77-78](#) (vacating restitution order on direct appeal); *see also United States v. Coates, 178 F.3d 681, 685 (3d Cir. 1999)* (vacating restitution order on direct appeal under MVRA); [United States v. Porter, 41 F.3d 68, 71 \(2d Cir. 1994\)](#) (vacating restitution order on direct appeal where district court improperly delegated setting of restitution schedule); [United States v. Albro, 32 F.3d 173, 174 \(5th Cir. 1994\)](#) (same).

Yaromich failed to raise the issue of his restitution payment schedule on direct appeal, or, for that matter, in either his § 2255 petition or his motion to vacate his sentence. Yaromich instead now challenges his sentence under [18 U.S.C. § 3572\(d\)](#), which provides that “[i]f the judgment, or

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<sup>1/</sup> Under the MVRA, restitution is mandatory when a defendant is convicted of a crime of violence, an offense against property, or an offense related to tampering with consumer products in which an identifiable victim has suffered a physical or pecuniary injury. [18 U.S.C. § 3663A\(c\)\(1\)](#). The MVRA applies to sentencing proceedings in cases, like Yaromich’s, in which the defendant was convicted on or after April 24, 1996. [Davis, 306 F.3d at 425](#).

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in the case of a restitution order, the order, permits other than immediate payment, the length of time over which scheduled payments will be made shall be set by the court . . . .” [18 U.S.C. § 3572\(d\)\(2\)](#).

It further allows for the court to adjust the payment schedule, “as the interests of justice require,” based on a showing of a material change in the defendant’s economic circumstances. [18 U.S.C. § 3572\(d\)\(3\)](#). This is not the relief that Yaromich seeks. Instead, Yaromich is challenging the Court’s authority to impose the sentence it did in his case. Such a challenge is beyond the parameters of the relief provided in Section 3572.

Yaromich’s motion could be considered a motion to vacate or correct his sentence pursuant to [22 U.S.C. § 2255](#). See [Weinberger, 268 F.3d at 352 n.1](#) (assuming without deciding that prisoner can challenge restitution order under § 2255 when coupled with claim of ineffective assistance of counsel, even though not claiming a right to be released). However, “[s]entencing challenges generally cannot be made for the first time in a post-conviction § 2255 motion . . . [and] must be made on direct appeal or they are waived,” unless reviewed as part of an ineffective assistance claim. *Id. at 351*. Moreover, Yaromich already filed a motion in this Court pursuant to § 2255. Accordingly, the Court will not construe Yaromich’s present order as an application for relief under that section.

Finally, a prisoner may also be able to bring such a claim on a petition for a writ of habeas corpus pursuant to [28 U.S.C. § 2241](#) as a challenge to the manner in which his sentence is being executed. See [United States v. Wynn, 328 Fed. App’x 826, 829 \(3d Cir. 2009\)](#); see also, [Enigwe v. Snizeik, 2006 WL 413592, at \\*1 \(N.D. Ohio Feb. 21, 2006\)](#), aff’d, *Enigwe v. Snizeik*, No. 06-3473 (6th Cir. August 3, 2006). Such a petition, however, is properly brought in the district of confinement. See *id.* Moreover, Yaromich would have to show exhaustion of administrative

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remedies before filing such a petition in the Middle District of Pennsylvania. *Id.*; see also *Little v. Hopkins*, 638 F.2d 953 (6th Cir. 1981).

The Court thus finds no basis in law to grant the Petitioner the relief he seeks and denies the present motion.

#### IV. Conclusion

For the reasons discussed above, the Court **DENIES** the Petitioner's Motion to disallow the collection of fines or restitution. [Doc. [124](#).]

IT IS SO ORDERED.

Dated: January 28, 2010

s/ James S. Gwin  
JAMES S. GWIN  
UNITED STATES DISTRICT JUDGE